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REFORM IN CRIMINAL PROCEDURE.

WITHIN the present century some changes have been made in criminal pleading and procedure, in England and in this country. Quite generally the burdensome requirement of setting out *in extenso*, in perjury indictments, the proceedings in the course of which the perjury was committed, has been abolished. Certain matters of mere form in indictments, — as the allegations "against the statute in such case made and provided," "against the peace of the Commonwealth," "with force and arms," — have been dispensed with. It is now quite generally provided that merely formal objections to an indictment may be disregarded or must be made at an early stage, and that an allegation of ownership is satisfied by part ownership or by possession. Changes of this character, while they simplify to some extent the labors of the criminal pleader and lessen the effect of unimportant mistakes, are, after all, superficial. Moreover, such alterations as have been made, have been made upon no general scheme or principle.

In England, certain more radical changes have been made, as, for instance, in the provisions for the amendment of indictments, and in the provision that upon an indictment for larceny a conviction may be had for embezzlement. Legislation of this latter character would be impossible here in this country, because it would be unconstitutional; and, indeed, in many respects the question of

reform in criminal procedure must, in this country, for constitutional reasons, be approached from a different point of view from that of England.

Such improvements as have thus far been introduced in criminal pleading and procedure in England and in this country are probably due, partly to a general change in public opinion, partly to suggestions of prosecuting officers, based upon particular inconveniences forced upon their attention. They have rarely, if ever, sprung from systematic efforts for improvement. Bankers, warehousemen, mechanics, ship-owners, manufacturers, mill-operatives, are organized, are respected classes, and have legitimate common interests which they can bring to the attention of the Legislature. Crime has no such representatives. Respectable people do not expect to commit crimes, and do not plan in advance for a proper criminal procedure; the criminal class, in so far as there may be said to be a criminal class, would have no standing if it undertook to present a scheme of criminal law reform, in view of prosecutions which it expected in the future to have to meet; the general public has no accurate knowledge as to the imperfections of criminal procedure; and it is much easier for prosecuting officers to meet or submit to the difficulties of pleading and procedure that confront them, than to press reforms through the Legislature. It is easy enough, therefore, to see why no systematic reform of criminal law or criminal procedure should have been made, either in England or in this country, in spite of some occasional efforts to that end; and yet there is no branch of the law, and no range of affairs, in which reform is more needed, and probably none in which it could be so simply and safely effected.

It is proposed in this article to suggest certain improvements in criminal procedure and pleading.

1. The grand jury undoubtedly had its use in early times, either as a prosecuting body or as a bulwark against prosecutions. To-day it is nothing but a burdensome incumbrance. Theoretically, it surveys the whole field of human action within the county or district, and of its own motion presents to the court charges against those whom it believes to have broken the laws. Practically, it is a mere *ex parte* tribunal to hear cases sent up to it by committing magistrates, or presented to it by the prosecuting officer. It is, in ninety-nine cases out of a hundred, a mere trial court, handicapped by hearing witnesses only for one side. A little cross-examination or evidence in defence will often entirely break down a good *prima*

facie case; but there is no cross-examination, and nothing in defence, before the grand jury. Moreover, the grand jury is, in practice, mere clay in the hands of the prosecuting officer. He, in practice, determines what witnesses shall be called, conducts the examination of witnesses, and advises the grand jury as to the law. He has it in his power to make a case appear stronger than it is, or weaker, or to defeat it by an adverse opinion as to the law, and this absolutely without responsibility to the public. The grand jury simply serves to shield him from a responsibility that he ought to bear. In so far as the grand jury is to be viewed as a supervising and prosecuting body, its duties are better performed by the police and the prosecuting officers; in so far as it is viewed as a protection to individuals against unjust prosecution, not only is it ineffectual in that respect, but its duties can be much better performed by preliminary tribunals. It is undoubtedly true that of cases sent by committing magistrates to the grand jury, the grand jury throws out a considerable percentage. From this it might seem to follow that the grand jury is a protection to defendants. This, however, is a superficial view. Under the present grand jury system, committing magistrates are required by law to determine, not whether there is a case against the accused, but merely whether there is probable cause to believe him guilty: they are not to pass upon the question of sufficiency of evidence to convict. If the grand jury were abolished, and its duties were vested in the magistrates, they would, upon the preliminary hearing, themselves throw out those cases of mere probable cause which they now send to the grand jury for sifting. A trained magistrate, with the responsibility of his office, sitting in open court, subject to public criticism, and hearing the defence, would afford much more protection to innocent persons against the burden of an unnecessary jury trial than the grand jury, hearing only one side, and sitting in secret.

In some of our States the grand jury does not now exist. In those States, it is believed, no one would think of introducing it. In most, if not all the States that still have the grand jury, the State constitution probably requires it, for serious crimes, as does the Federal constitution for Federal prosecutions. There is nothing in the constitution of the United States, however, requiring a State to maintain this institution,[1] and any State can, therefore, by amendment of its own constitution, abolish it. An amendment of

[1] Hurtado *v.* California, 110 U. S. 516.

the constitution of the United States would be necessary to the abolition of it in Federal procedure.

The constitutional requirement of prosecution by the grand jury, where it exists, probably nowhere extends to all classes of crime. The rule upon this point is not uniform; but in most if not all jurisdictions, prosecutions may within certain limits be made by complaint or information. In most if not all the States, and in the Federal jurisdiction, many offences are at present, by reason of the character of a theoretical maximum penalty, required to be prosecuted by indictment, which might, without constitutional amendment, and by a mere change in the classification of offences, or a more detailed gradation of punishments, be put outside the constitutional requirement. Every statutory enlargement of the classes of acts punishable under complaint or information would tend in the direction of the reform now suggested.

One important and far-reaching result of the abolition of the grand jury, or the narrowing of its range of action, would be the power of amendment. Under the grand jury system an indictment is in theory, although not in fact, the statement of the grand jury, and therefore no amendment in it can be made except by the grand jury; and as the grand jury is ordinarily dismissed as soon as it has reported its indictments, a defect discovered after that time is fatal. In England, by statute, indictments may be amended; but England has no constitutional limitations. There would seem to be no constitutional difficulty in providing that where prosecution originates by complaint, the complainant may be permitted to amend it.

2. In such prosecutions as may now be begun by information or complaint, provision should be made by statute for amendment.

3. A defendant should be permitted to waive trial by jury. Theoretically, trial by jury is the bulwark of innocence; but practically, in certain classes of cases, and in individual cases of all classes, it is the defendant's greatest peril. It is a matter of common remark among prosecuting officers that a conviction of crime can be got in certain classes of cases upon evidence on which a verdict could not be got in a civil case. Indeed, there are offences in which hardly more than an accusation is necessary to a conviction. If the present requirement of trial by jury rested upon the ground that judges are likely to be too lenient, waiver of jury trial should not be allowed; but since, as all the books put it, a trial

by jury is a privilege of defendants, a defendant ought to be allowed to waive it.

4. The question of the place of trial ought to be more systematically regulated. It is now, in many cases, a matter of accident. If a person steals an article in Boston and travels with it to Springfield, he is indictable in any county and in every county through which he has passed, since in each county there has been, in the eye of the law, a taking and a larceny. So, by statute, in England and in some of our States, a person who commits a crime in a public conveyance may be prosecuted in any county through which the transit takes place. So, in any offence, one commits a crime, in the eye of the law, in any locality where he acts, either personally or by an innocent agent. From this it follows that one often commits his offence in more places than one. He who utters forged paper by mail is guilty of uttering at the place where he deposits the paper in the mail, and also at the place where it is delivered by the post-office. In libel by newspaper publication, the offender commits the crime, and is punishable, in the locality where the newspaper is published, and also in every other county or district into which, by his direction, or as a natural result of the publication, a copy goes. In the crime of conspiracy, all the conspirators are indictable and punishable in any and every county or district where any one of them commits an act in pursuance of the conspiracy. The matter of venue, or locality of trial, is recognized in the constitutions of the United States and of the States as a matter of vital importance, and, within limits, a matter of right. If it is a matter of importance, and, in any sense, a matter of right, it ought to be fixed upon some principle, and with a view either to the best ascertainment of the truth, or of practical convenience to the public and the accused. It cannot be fixed by arbitrary rules. It should be fixed, in each case, after complaint or indictment, by the court, upon motion of either party. It ought to be settled with reference, first, to the question of a fair trial, second, with reference to the matter of expense and of convenience. In a vast majority of cases the question of venue would settle itself; but there are many cases in which unnecessary expense is made, and a less fair trial had, by reason of an artificial statutory determination of the venue.

5. Criminal pleading should be simplified, and pleadings in different offences should be put upon one common footing. At present there is no uniform rule. In some offences, as in the

crime of obtaining goods by false pretences, and in some forms of embezzlement, as well as in many new statutory offences, the requirements of pleading are extremely severe, and often seriously embarrass prosecutions, and put the government to great and needless expense. In other offences, on the contrary, particularly in some of the older and more familiar crimes, the requirements of pleading are extremely loose. There should be one rule upon the subject, applicable to all offences, old and new. If it is proper in embezzlement, in obtaining goods by false pretences, and in modern statutory crimes in general, to require that the complaint or indictment shall set forth all the essential facts creating the offence, a similar rule ought to be applied in larceny, and the pleading of conclusions of law ought to cease. If, on the other hand, pleading of conclusions of law are unobjectionable, they ought to be allowed in all crimes.

The wide diversity in pleading between the older and some of the newer crimes is well illustrated by the difference of requirements in larceny, embezzlement, and false pretences. In each of these offences the wrong consists in despoiling another of his goods. The difference between these crimes is this: that in larceny one wrongfully acquires the possession of goods, — no more, no less; in embezzlement he violates a possession lawfully acquired; in false pretences he gets both possession and title. If I to-day have a gold watch, and to-morrow it has gone from me, never to return, wrongfully and without an equivalent, it is immaterial to me whether the wrongdoer gets it by acquiring possession of it unlawfully, or by lawfully violating a possession which he lawfully had, or by unlawfully getting from me both possession and title together. Indeed, these crimes run so close together that it is often a matter of great subtlety within which of them a given act falls. It would seem to follow that there should be a common requirement of pleading in respect of these offences. In embezzlement, however (except where relaxing statutes have been passed), and in false pretences, it is necessary to set forth the transaction, — in embezzlement, the contract of bailment under which possession was got, and the fact of violation of it by the defendant; in false pretences, the contract of purchase, exchange, or the like, and the getting of title and possession under it by the defendant, — in order that the court may be able to say, from a consideration of the facts, whether or not the grand jurors or the complainant or informant properly interpreted the act; while in

larceny it is competent to the prosecutor simply to allege that the defendant "stole, took, and carried away" the goods in question, — that is, to state a conclusion of law as to whether certain facts in law constitute larceny. It may be said in answer to this that there are certain wrongful acts which are essentially of a composite nature, and others which are elemental in character; that embezzlement and the obtaining of goods by false pretences are of the former class, and larceny of the latter. This is undoubtedly sound, in the sense that larceny is a more common and familiar offence than embezzlement and false pretences. and that a prosecuting officer can more safely be trusted to draw a conclusion of law as to larceny than as to embezzlement and false pretences; but it is not true that larceny is elemental in the sense that any sensible person, or even any well-informed lawyer, can, with certainty, determine whether or not a given act does or does not constitute larceny. There are many cases of serious wrongdoing in respect of chattels, not criminal at all, which nevertheless a prosecutor might suppose to amount to larceny, and allege as such. In such a case the setting out of the facts in the manner in which they are required to be set out in embezzlement and false pretences would enable a defendant to establish his lack of criminality by demurrer, and save him and the public the burden and expense of a trial.

In the matter of simplification of pleading there are, of course, in the Federal jurisdiction and in our States constitutional limitations. The Legislature cannot abridge ancient forms or establish new ones to the extent of sanctioning the omission of essentials of the offence. In some of our States the Legislature, in attempting to simplify pleading in prosecutions of a popular character, has gone beyond the constitutional limit.[1]

6. Provision should be made for the taking of testimony for the prosecution, by deposition. In the Federal practice, and probably in all the States, there now is provision for the taking of deposition by defendants. In Massachusetts, and very likely in other States, it is provided that if the defendant takes depositions, the government may do so. The Federal statutes provide in general terms for the taking of depositions in criminal cases, and the language of the Federal statutes would cover depositions in behalf of

[1] Commonwealth *v.* Harrington, 130 Mass. 35; State *v.* Learned, 47 Me. 426, 433; McLaughlin *v* State, 45 Ind. 338; Hewitt *v.* State, 25 Texas, 722. See Commonwealth *v.* Freelove, 150 Mass. 66.

the government. But where it is provided by constitution (as it is by the constitution of the United States, and by the constitutions of many, if not all, of the States) that the accused is entitled to meet the witnesses against him face to face, it would seem clear that, without constitutional change, no provision can be made for depositions for the government, at least without bringing the defendant face to face with the witnesses at the taking of the deposition, — a thing practically out of the question where depositions are taken at a distance. It even seems doubtful whether such a statute as that of Massachusetts, providing that the defendant, by taking depositions, grants to the government the right to take them, is constitutional. It amounts to an enactment that a defendant may waive his constitutional privilege of meeting the witnesses face to face; and it is very doubtful, to say the least, whether the Legislature can authorize such a waiver, in grave offences.

The lack of the right, on the part of the government, to take depositions, constantly leads to great needless expense, and occasionally causes a failure of justice. A man obtains goods in Massachusetts by a false representation that he has an account, or otherwise has financial relations, with a banker in London; his representation may be such that no one can negative it except the foreign banker himself. If the banker is not willing to give up three or four weeks to come to Boston to testify, the government is powerless. The same thing would happen if the necessary witness were old and infirm, and unable to attend court. If swindlers, as a class, planned ahead as carefully for trial as they do for the immediate success of their frauds, they might very generally secure for themselves immunity by shaping the fraud so as to require, in proof, an impossible attendance of witnesses. Perhaps it would not be thought right, in serious offences and upon matters going to the essence of the crime, to provide for a conviction upon depositions; but there are many matters hardly more than formal, or leaving no real ground for controversy, upon which it would be safe to proceed by deposition, and it might well be left to the courts, or be fixed with some detail by statute, within what limits depositions in behalf of the government might be used.

7. One of the most serious defects in criminal procedure is the unnecessary delay that often takes place between arrest, and final judgment and sentence. Where the accused is on bail, the delay to him is, of course, not so serious as if he were in commitment;

but even then it is a disaster to a man to have an accusation hang over him indefinitely, impairing his credit in the community, and interfering with his plans; and in case of guilt the community suffers by delay, even though the accused be on bail. The practical efficiency of punishment for crime lies, not in the shutting up or extinction of the criminal class; for the criminal class merely flows through the prisons, and nine-tenths of it is constantly at large. The chief efficiency of punishment lies in the apprehension which it creates among those disposed to crime. In the case of unthinking persons, a substantial breathing-space is the next thing to acquittal. Nothing impresses such persons like swiftness of punishment. A sentence of two years, coming two weeks after the crime, would do more to prevent crime than a sentence of five years imposed after the matter is forgotten. Moreover, with most people in the community, even the best and the wisest, lapse of time induces pity; and when a crime has gone almost out of recollection, there is often a feeling of weariness and of lack of fitness in the penalty. In England, where, until lately, there was practically no court of criminal appeal, and where there is now no appeal as of right, and in practice appeals are few, punishment often follows close on crime. In our States and in the Federal jurisdiction there is often great delay. The accused, if unable to give bail, frequently has to wait for months before he can even be brought to trial. In the smaller counties of Massachusetts, for example, where terms of the Superior Court are held for criminal business only twice in the year, and last but for a few days, a person arrested shortly after the close of one term, and unable to furnish bail, has to lie in jail nearly six months before his case can be tried by a jury or come before the grand jury. If the grand jury finds "no bill," then he has been needlessly detained half a year, the public have been at expense for his support, his family have very likely suffered, and he, from mere detention in jail, has undergone a demoralization that will follow him indefinitely. To have been imprisoned for months on a charge of crime is, in the minds of most people, as time passes on, tantamount to having served a term of imprisonment under sentence. If after lying in jail six months the accused is convicted, but the conviction turns on a ruling in law, and the case goes to the Supreme Court, it is likely to be several months before it is heard there. If the decision there overturns the verdict, the accused will have been in jail perhaps a year on a charge unfounded in law. If, on the other hand, the Supreme Court sus-

tains the verdict, another term of the Superior Court may well then have passed by, and the convict may have to wait in jail four or five months more before sentence can be imposed; and this although the proper sentence may be less than the time he will have spent in jail awaiting it. For such delays there is no reason. If they are due to the county system of trials, that system ought to be abolished. There ought to be a frequent jail delivery. Appeals on questions of law to the court of last resort should be entered and heard speedily. If the docket of the court of appeal is too burdened for this, provision should be made for relief. It is a mere matter of business system and organization to keep the docket of a court open for the ready determination of appeals; and criminal cases, being a matter of public and not of mere private concern, ought not to be delayed, whatever else is delayed. Owing to the romantic charm which the term "*habeas corpus*" has with the English-speaking race, there is a tradition quite prevalent in the courts that *habeas corpus* takes precedence. Under this tradition, a judge of a high tribunal will often stop important business to hear a petition for relief from imprisonment upon civil process. The same magistrate will not be in the least disturbed by the fact that a man whose guilt or innocence turns upon a question of law may lie in jail six or eight months, or a year, to await the determination of civil disputes, many of them unimportant.

8. There are constitutional provisions throughout this country to the effect that no person shall be compelled to give evidence against himself. The writer does not believe in the wisdom of such provisions. It not infrequently happens that a person guilty, and well known to be guilty, of an atrocious crime, escapes because of the inability of the government to prove some essential fact which everybody in the community knows to be a fact. In many such cases, if the defendant were subject, not indeed to persecution or secret inquisition, but simply to examination upon the witness-stand in open court at his trial, the facts could be brought out. No innocent man is injured by having the truth known; and there seems to the writer to be no reason why guilty persons, as a class, should be protected. The constitutional provision relates to a state of oppression now long gone by.

9. The practice of arresting at the outset, in minor offences, persons accused who are not in the least degree likely to evade later arrest, is a relic of earlier times, and should be abandoned.

In England provision is made by statute for the summoning, in minor prosecutions, of defendants who are not likely to depart. Beginnings have been made, by statute, in one or more of our States in this direction, but the interests of officers in fees intrenches strongly the present practice. In not one case in one hundred, of prosecutions upon municipal by-laws, or for any of the minor offences cognizable by inferior courts, will the accused fail to respond. There is no reason why a person, in such case, should not be brought in by summons. It daily happens that persons unnecessarily arrested are put to expense, in one form or another, in the securing of bail. In the cities, if of a humble station, they or their friends often have to pay some one to go bail. This simply means taking food and clothing from the family of the accused. In the country, the accused may have to bring his sureties twenty, thirty, or one hundred miles, and, after bail is given, may have to travel back home with them. The entire practicability of a summons system, judiciously applied, and the hostility of officials to it, are both well illustrated in Massachusetts. In Barnstable County defendants in minor prosecutions are almost invariably summoned, not arrested, and the practice works perfectly; in some other parts of the State a warrant usually issues, and the officer and bail magistrate get their fees. In different suburbs of Boston, having precisely the same class of cases and defendants, — as, for example, West Roxbury and Dorchester, — one police court issues a summons, another issues warrants and makes fees. The writer believes the present system of preliminary arrest to be one of the most serious oppressions of the present day, and as needless as it is serious.

10. In every criminal case, great or small, the public should provide witnesses for the defence as well as for the prosecution, at least where the accused is not able to bring his witnesses. The old theory was that a prosecution for crime was a contest between the injured person, or his relatives, and the accused. That theory has gradually yielded to the milder view that the contest is between the public and the accused. We ought now to be ready for the theory that a criminal prosecution is not a contest at all, but an investigation, conducted by the State, before a tribunal of its own appointment, with as great a desire to clear the defendant, if not guilty, as to convict him, if guilty. It is idle to say that "truth will out," and that if a man is innocent the

jury will find him innocent, even though witnesses in his behalf are not summoned. Any one who has tried cases in a criminal court, or in any court, knows how hollow this is. The Trefethen murder case in Massachusetts affords a striking example of this proposition. Upon one trial the defendant was convicted of murder in the first degree. Upon the second trial, with slightly different evidence, he was acquitted. Provision is made, to some extent, in different jurisdictions for the summoning of witnesses for the defence. The practice is, perhaps, universal, of summoning them in capital cases and in other classes of cases involving a grave punishment; but the principle is the same, for great cases and for small. The conviction of a working-man, and his sentence for six months or a year, are an immediate disaster to him and to his family, and entail degradation upon them. The community cannot afford to ruin a family, or to put the prison taint upon an innocent man. No question of expense should be considered in this connection. If it were necessary to choose, it would be better to abandon ornament and display in public buildings, and to give up public libraries and parks, than, for the sake of economy, to conduct a one-sided investigation into the guilt or innocence of human beings; but in fact, the cost, as compared with the whole budget of public expenditure, would be very trifling. It could not be greater than that of the cost of summoning government witnesses; and the total cost, in most of our States, for government witnesses in criminal cases is a small percentage of the whole public expenditure.

The reasoning which supports the summoning of witnesses for the defence would lead to the employment of counsel to represent defendants. Witnesses are often important to the establishment of innocence, but they are no more important, on the average, than the services of counsel. If the theory is once recognized that a prosecution for crime is not a contest between the government and the accused, but is a public investigation, there is no reason why one side of the investigation should not be represented by counsel as well as the other. The writer believes that the wisest plan would be to appoint, by law, salaried defending counsel, answering to prosecuting attorneys; to offer their services freely to all such defendants as should choose to accept them; and where the defendants choose to have counsel of their own, or refuse to accept the public counsel, to have the public counsel none the less attend upon the trial, with power to call

the attention of the court to any circumstances of fact or of law tending to innocence. There is no reason why the line should be drawn at murder cases. It should be clearly recognized that every improper conviction for crime is not only an undue harshness to the accused and those dependent upon him, but is also a serious injury to the public.

11. There should be an appeal upon the question of the extent of sentence, at least in cases of substantial punishment. In some States the sentence is fixed, at least in some cases, by the jury. Where the sentence is not fixed by the jury, it is ordinarily determined by a single judge. Naturally, there is a great inequality in sentences. If a case were presented at the same moment, upon precisely the same evidence, to five different judges, and each of them were to be required to write down his own notion of the proper sentence, the result would be surprising. In not a few cases the terms of sentence suggested by different judges would vary as much as from three to eight years. This is a matter, of course, upon which no statistics can be had, since the same precise question is almost never passed upon by two different judges; but the writer believes that most persons who have had opportunities for observation will concur with him in his present opinion. If this is so, — and the differences in human disposition, training, and prejudices make it almost impossible that it should be otherwise, — it is largely a matter of accident with a prisoner what sentence he will receive. A judge from a rural county will consider horse-stealing an enormous crime, and sentence accordingly. A judge from a city county will consider horse-stealing a mere stealing of value, and sentence accordingly. So it is with numerous other offences. Of course no tribunal can be obtained which will work with the accuracy of a machine; but if there were a right of quick appeal on the matter of sentence, there would be at least an approach to uniformity; and if, upon appeal, counsel for the government and for the defendant were to be heard, and brief reports were to be published, a code would soon form itself by which a given conviction could readily be classified scientifically, and the punishment, within narrow limits, almost certainly predicated. The result of this would be that after a short time equality would be secured without the necessity of appeal. The certainty which now obtains in most respects with regard to the rules of criminal law reduces enormously the number of appeals in law. A court of appeal on sentence would, in the same

way, mark out a course of uniformity, and simplify the whole matter.

12. The theory that a criminal prosecution is a public investigation would lead also to the conclusion that no person should be sentenced, unless to a petty punishment, without the fullest possible knowledge of all the facts. The government commonly makes some investigation into an offender's record; but provision ought to be made for a rigorous investigation, in the interest of the defendant as well as of the prosecution.

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